Supreme Court, U.S.
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No. 02-400

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; AMERICAN INTERNATIONAL GROUP, INC.; CENTRA, INC.; CENTRAL TRANSPORT, INC.; AND GLS LEASCO OF MICHIGAN, INC.,
Petitioners,

v.

MARIE V. LYNCH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN M. WILEY; AND SUSAN REESE, ADMINISTRATRIX OF THE ESTATE OF JUSTIN L. REESE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS*

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

A. The Decision Below Is Contrary to DOT's Interpretation of Its Regulations and of the Statutory Purpose. 2

B. The Decision Below Exacerbates the Conflict in the Decisions Construing the MCS-90 Endorsement. 5

CONCLUSION 7

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* There has been no change in the Corporate Disclosure Statement contained in the petition for certiorari.

TABLE OF AUTHORITIES

Page

Cases

Adams v. *Royal Indemn. Co.*, 99 F.3d 964 (10th Cir. 1996) 2

Canal Ins. Co. v. *First Gen. Ins. Co.*, 889 F.2d 604 (1989), *modified on other grounds*, 901 F.2d 45 (5th Cir. 1990). 6

Carolina Cas. Ins. Co. v. *Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979) 5, 6

John Deere Ins. Co. v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 534 U.S. 1127 (2002) 2, 4, 6

Motor Carriers of Prop. Minimum Amounts of Bodily Injury & Prop. Damage Liab. Ins., 132 M.C.C. 948 (1982). 6

Pierre v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.) (No. 170, argued Nov. 12, 2002) 1, 7

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 2

Other Authorities

Brief for the United States as Amicus Curiae in *John Deere Ins. Co.* v. *Nueva*, *cert. denied*, 534 U.S. 1127 (2002) (No. 00-1491) (filed Jan. 3, 2002) 1, 2, 4, 6

Page

Rules

49 C.F.R. § 387.1 4

49 C.F.R. § 387.5 3

REPLY BRIEF FOR PETITIONERS

The reasons for denying certiorari proffered by Respondents in their Brief in Opposition ("Opp.") cannot withstand analysis. More importantly, Respondents do not even attempt to deal with the more compelling grounds supporting certiorari. They wholly ignore the fact that the construction of the MCS-90 Endorsement which they defend has been squarely rejected by the Department of Transportation ("DOT"), the very agency that promulgated the Endorsement.[1] Moreover, while they downplay (albeit erroneously) the existing conflict in the lower court decisions, they ignore the fact that this conflict can only recur and intensify in light of DOT's position on the matter. Lower courts must now reject either the interpretation of the MCS-90 Endorsement adopted by DOT or decisions such as that rendered by the Ohio Supreme Court in this case.[2] In fact, a case posing that choice is now *sub judice* in the New York Court of Appeals.[3] The Court should grant certiorari to resolve this recurring conflict so that motor carriers, their insurers, and the representatives of accident victims will know without further delay the scope of obligations imposed by the federally mandated MCS-90 Endorsement.

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[1] See Brief for the United States as Amicus Curiae in *John Deere Ins. Co.* v. *Nueva*, *cert. denied*, 534 U.S. 1127 (2002) (No. 00-1491) (filed Jan. 3, 2002). This brief is excerpted at Pet. App. 45a-56a, and has been separately lodged with the Clerk by Respondents.

[2] Contrary to what is implied at p. 6 of the Opposition, the Ohio Supreme Court did not prepare a syllabus in this case. The quotations at p. 6 appear to be taken from the synopsis of the case prepared by West Publishing for the North Eastern Reporter. See 768 N.E.2d 1158.

[3] *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.) (No. 170, argued Nov. 12, 2002).

A. The Decision Below Is Contrary to DOT's Interpretation of Its Regulations and of the Statutory Purpose.

As shown in the Petition (Pet. 11-13), the decision of the Ohio Supreme Court conflicts with the Department of Transportation's interpretation of its own regulations — an interpretation that is entitled to judicial deference. That fact notwithstanding, Respondents (Opp. 25) assert that "DOT is satisfied with the status quo" and that DOT is "in effect affirming the Ninth and Tenth Circuit decisions in" *John Deere Ins. Co.* v. *Nueva*, 229 F.3d 853 (9th Cir. 2000), *cert. denied*, 534 U.S. 1127 (2002), and *Adams* v. *Royal Indem. Co.*, 99 F.3d 964 (10th Cir. 1996). Respondents' contention is based solely on the fact that DOT has not initiated rulemaking to overturn the decisions in those cases. No authority is cited, however, for the proposition that an agency's inaction constitutes acquiescence in decisions rendered in private party litigation that the agency believes have misconstrued its regulations. That proposition is particularly inapt in the circumstances of this case, given that less than a year ago the General Counsel of DOT signed a brief that concluded that the construction of the MCS-90 Endorsement adopted in *Nueva* and *Adams* was "incorrect." See Pet. App. 45a, 50a.

Equally unfounded is Respondents' assertion (Opp. 25) that review by this Court would mean "taking away [from DOT] the power to clarify its own rules . . . ." Under that misguided principle, this Court would never grant review of a decision that misconstrues an agency's regulations. Moreover, the practical effect of Respondents' position — that the agency's interpretation of its regulations should be ignored — is at odds with the well-established principle of requiring deference to that interpretation. *E.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994).

In any event, Respondents' assertion that DOT's regulations need "clarifying" fails to specify what is unclear. As shown in the Petition (at 12-13), the MCS-90 Endorsement requires insurance coverage for "any final judgment recovered *against the insured* for public liability resulting from negligence in the operation, maintenance or use of motor vehicles . . . ." Pet. App. 38a (emphasis added). And the accompanying regulation defines "insured" as meaning "the *motor carrier named* in the policy of insurance . . . ." 49 C.F.R. § 387.5 (emphasis added) (Pet. App. 34a). There is nothing in this language that provides any textual basis for the decision below imposing on an insurer liability for judgments rendered against someone other than the named insured. While Respondents obfuscate the point here (see Opp. 3-4), it was undisputed in the Ohio courts that neither Yob nor Bath Transport were insureds under the trailer policy. Pet. App. 3a.

Respondents defend the decision below on the ground that it ensures that "injured members of the public have redress for the negligence of interstate motor carriers." Opp. 1; see *id.* at 19-24. That assertion ignores the fact that Respondents already have redress here against the insurance coverage for the tractor operator — the actual negligent party in the case. The trial court's ruling that "$1,000,000.00 of the Bath tractor policy[] is available regarding this accident" was not appealed. Pet. App. 28a. Hence, the required insurance coverage *is* available from the responsible party, whose negligence is uncontested.

What the Ohio Supreme Court did in this case was to rewrite an insurance policy and the MCS-90 Endorsement so as to permit recovery of an amount in excess of the coverage required under DOT regulations from the insurer of the party (the trailer owner) whose lack of culpability was

uncontested.[4] There is no good reason to believe that this result furthers the statutory purpose. On the contrary, the Solicitor General informed the Court in *Nueva* that "[i]t is not . . . central to the statutory or regulatory purpose that a member of the public be able to recover from a motor carrier's insurer for a loss that is not covered by the carrier's ordinary insurance policy, and that does not result in any legal judgment against the carrier." Pet. App. 48a.[5] The fact that the decision below has plainly misconstrued a federal regulation of widespread practical importance warrants review by this Court.

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[4] This is clear from the description of the issue presented as framed by the Ohio Supreme Court:

> "The specific issue for consideration is whether coverage is available on the trailer under a federally mandated endorsement to the insurance policy, called an MCS-90 endorsement, even though the operator of the rig was not an insured under the terms of the trailer's main policy, and even though there is no claim that the trailer owner was negligent." Pet. App. 2a.

The state-law principle discussed at Opp. 20 n.27 (that both the tractor policy and the trailer policy are available in the event of an accident) applies only if there is coverage available under both policies. In this case, there is no coverage under the "trailer's main policy," and thus that authority is not on point.

[5] Moreover, as the Trucking Industry Defense Association shows in its brief as *Amicus Curiae*, the result reached below has the untoward effect of shifting the ultimate costs for an accident away from the negligent carriers to innocent lessors of equipment such as trailers. That result is contrary to one of the two principal purposes underlying the DOT regulations — namely, "to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner . . . ." 49 C.F.R. § 387.1 (Pet. App. 34a).

B. The Decision Below Exacerbates the Conflict in the Decisions Construing the MCS-90 Endorsement.

Certiorari is also justified because the decision below exacerbates a pre-existing conflict on decisions construing the MCS-90 Endorsement. Respondents try (Opp. 11-19) to downplay the conflict, but that effort to distinguish earlier decisions cannot withstand analysis.[6] Putting to the side purported distinctions that have no conceivable legal significance,[7] Respondents assert two arguments to explain away the conflict:

- Cases such as *Carolina Cas. Ins. Co.* v. *Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979), involve disputes over which of several insurers shall pay the injured party, while this case involves a dispute between an injured party and an insurance company.
- Many of the cases in conflict with the decision of the Ohio Supreme Court arose under an earlier ICC BMC-90 Endorsement.

Neither distinction holds water.[8] As previously pointed out (Pet. 15), the operative language in the MCS-90

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[6] Respondents also completely ignore the conflict in state court decisions. See Pet. 14 n.16.

[7] For instance, Respondents try to distinguish *Carolina Cas. Ins. Co.* v. *Insurance Co. of N. Am.*, 595 F.2d 128 (3d Cir. 1979), on the ground that "[i]n Carolina Casualty, the tractor-trailer was owned and insured as a whole by one entity and leased and insured by another. . In the instant case, the tractor and trailer are separately owned and insured." Opp. 13. No explanation is given (and none is apparent) as to why this distinction should lead to an interpretation of the MCS-90 Endorsement in this case that differs from that in *Carolina Casualty*.

[8] The *amicus* brief for the Trucking Industry Defense Association further develops the conflict between the decision below and other lower court decisions.

Endorsement and the accompanying regulations cannot mean one thing when an insurance company is the claimant and something else when an accident victim is the claimant. Furthermore, there is no material difference for present purposes between the MCS-90 Endorsement and the earlier BMC-90 Endorsement. The Solicitor General in the *Nueva* brief described the requirement at issue in the earlier decisions as being "essentially the same one that is now implemented using the Form MCS-90 . . . ."[9] Pet App. 53a. See *Canal Ins. Co.* v. *First Gen. Ins. Co.*, 889 F.2d 604, 611 (1989) (describing the MCS-90 and BMC-90 Endorsements as being "identical in relevant part"), *modified on other grounds*, 901 F.2d 45 (5th Cir. 1990).[10]

More importantly, Respondents fail to respond to the point (Pet. 16-18) that the conflict will recur until resolved by this Court. Indeed, the uncertainty is likely to increase now that DOT has spoken on the issue of how the MCS-90 Endorsement should be construed. Lower courts must either disregard the views of DOT on its own regulations or disregard decisions such as the Ohio court's in this case and the Ninth Circuit's in *Nueva*. One such case is already pending in the New York Court of Appeals and was argued

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[9] The basis for this conclusion can be seen by comparing the excerpt of the BMC-90 Endorsement quoted in the *Carolina Casualty* decision, 595 F.2d at 136 n.25, with the corresponding provisions in the MCS-90 Endorsement, Pet. App. 38a-39a.

[10] Respondents describe (Opp. 14) the MCS-90 Endorsement as being "broader" than its predecessor. For present purposes, however, the two forms are essentially identical, because the differences are not relevant to the resolution of this case. Private and other ICC-exempt carriers were required to obtain insurance coverage containing the MCS-90 Endorsement; those carriers were not required to obtain coverage under the BCM-90 Endorsement. Moreover, unlike the BMC-90 Endorsement, the MCS-90 Endorsement provided coverage for environmental damage. See *Motor Carriers of Prop. Minimum Amounts of Bodily Injury & Prop. Damage Liab. Ins.*, 132 M.C.C. 948, 950-52 (1982).

on November 12, 2002. *Pierre* v. *Providence Wash. Ins. Co.*, 730 N.Y.S.2d 550 (App. Div. 2001), *appeal pending* (N.Y.) (No. 170).[11] No doubt — given the frequency of accidents involving trucks (see Pet. 9) — numerous other cases will follow. Rather than allow the present uncertainty to linger on, the Court should grant certiorari now to resolve the conflict.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the Petition and undertake plenary review. In the alternative, it should grant the Petition, vacate the judgment of the Supreme Court of Ohio, and remand the case for consideration in light of the stated position of the Department of Transportation.

Respectfully submitted,

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[11] Petitioners will inform the Court if *Pierre* is decided before the Court acts on the Petition.